No. 02-1774

FILED
AUG 2 4 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

FRED RIGGS, DONNA SINGER, and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE AND ATTORNEY DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

On Petition For Writ Of Mandamus And Prohibition To The United States Court Of Appeals For The Tenth Circuit

HEALTH DISTRICT RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONERS' SUPPLEMENTAL AUTHORITY BRIEF

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ARGUMENT

Respondents San Juan Health Services District, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis and Lauren Schafer[1] respectfully submit this Supplemental Brief in Response to Petitioners' (first) Supplemental Authority Brief entered on the docket July 2, 2003. For the reasons set forth below, the cases cited in Petitioners' Supplemental Authority Brief do not support the relief sought by petitioners in their Petition for Writs of Mandamus and Prohibition.[2]

Petitioners' assertion that *Nguyen v. United States*, 123 S. Ct. 2130 (2003) upheld Congress' authority under Article IV of the Constitution to make all needful rules and regulations respecting territories or possessions is misleading. As an initial matter, a tribe is not a territory. Moreover, while the *Nguyen* opinion referred to Congress'

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[1] In this Court, petitioners have purported to add as parties (in their official capacities only) certain Health District board members who joined the board after petitioners filed this action, including Nettie Pract, Glen Imel and Cleal Bradford. Because suit brought against governmental officers in their official capacity is equivalent to suit against the entity, *McMillan v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (citations omitted), joinder of these board members is unnecessary. Respondents therefore have retained and used the original caption and parties named by petitioners. However, to the extent this Court deems joinder of the new board members in their official capacities proper, such parties should be considered represented by this response to petitioners' Supplemental Authority Brief.

[2] While petitioners apparently filed the Supplemental Authority Brief before respondents filed their Brief in Opposition, it was not served on respondents until July 8, 2003, after respondents filed their Brief in Opposition. Thus, respondents did not previously have an opportunity to respond to the arguments made by petitioners in the Supplemental Authority Brief.

Article IV authority with respect to territories, that power was not at issue and was not addressed by the Court. Rather, the Court addressed whether a panel of an appellate court composed of two appellate court judges appointed by Congress pursuant to Article III and one territorial district court judge appointed pursuant to Article IV had the authority to hear an appeal. This issue has nothing to do with the relief sought by petitioners.

Petitioners cite *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003), for the proposition that agreements made by the executive branch preempt or trump state law. From this proposition, petitioners argue that because the Navajo judicial program is funded by an executive branch agency (Bureau of Indian Affairs), its orders may be enforced as against non-Indians, including Truck Insurance and Dennis Ickes. *Garamendi* did not address tribal court jurisdiction but held only that an exercise of state power that touches on foreign relations must yield to the National Government's policy. This case does not involve a conflict between national foreign policy and state law. Petitioners' argument is an unwarranted extrapolation of *Garamendi's* holding.

Petitioners rely on *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003) in support of their argument that by enacting the Indian Civil Rights Act and Self-Determination Act ("ICRA"), 25 U.S.C. § 1301 *et seq.*, Congress delegated to tribal courts jurisdiction over non-Indians for any act occurring on land within the exterior boundaries of a reservation. However, *Hibbs* addresses the availability of money damages in federal court by state employees suing under the Family Medical Leave Act. *Hibbs* has nothing to do with ICRA or a tribal court's authority over non-Indians.

Petitioners also rely on Justice O'Connor's conclusion in her concurrence in *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) that the Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. From Justice O'Connor's statement, petitioners argue that the equal protection requirements imposed on tribes under ICRA means that both Indians and non-Indians are subject to tribal court jurisdiction for any action occurring within the exterior boundaries of a reservation. In fact, the equal protection guarantees of ICRA do not address the parameters of tribal court jurisdiction but simply require that the tribe (and therefore its courts) provide equal protection to all those within the tribe's jurisdiction. More importantly, petitioners' argument fails because non-Indians and tribe members are not similarly situated with respect to tribe membership.

Petitioners also argue that the Court should review this case based on a purported "split" between the Eighth Circuit and the Seventh Circuit on the issues raised by this case. *Compare United States v. Lara*, 324 F.3d 635 (8th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No. 03-107) *with United States v. Long*, 324 F.3d 475 (7th Cir. 2003), *petition for cert. filed,* 71 U.S.L.W. 3791 (U.S. June 10, 2003) (No. 02-1801). Actually, neither case addresses tribal court jurisdiction over non-Indians. Moreover, *Long* and *Lara* are not in conflict but rather address different issues. In *Long*, the Seventh Circuit addressed whether the Menominee tribe's criminal jurisdiction over its own members flowed from the tribe's independent sovereign powers or was based on powers delegated by Congress. *Long* found that the source of the tribe's powers over its own members was debatable because of a series of congressional acts that altered the

Menominee tribe's status as an Indian tribe. Pursuant to these congressional acts, the Menominee tribe's powers were terminated and later restored by Congress. The court ultimately found that, notwithstanding Congress' termination and later restoration of the tribe's powers, the tribe's criminal power over its *own* members was properly classified as part of the tribe's inherent sovereign powers. *Long* does not address or support petitioners' claim that the Navajo tribal court has inherent civil sovereign power over non-Indians.

Unlike *Long*, in *Lara*, the Eighth Circuit held that the power over non-member Indians given by Congress to tribes by way of the Duro amendments was properly classified as delegated power, not inherent power. Again, *Lara* simply does not address or support the relief sought by petitioners here.

Petitioners also erroneously cite *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), as upholding several of petitioners' arguments. Petitioners are correct that *Seneca-Cayuga* cites the definition of "Indian country" found in 18 U.S.C. § 1151, but the case did not address that definition nor suggest that it provides a basis for tribal court jurisdiction over non-Indians. Petitioners also argue that *Seneca-Cayuga* demonstrates that the Court should uphold Congressional intent in interpreting statutes. Here, however, for the reasons set forth in respondents' Brief in Opposition, petitioners fail to point to any legislation demonstrating Congress' intent to bestow tribes with unfettered jurisdiction over non-Indians for any action occurring within the exterior boundaries of a reservation.

Finally, petitioners cite to *Seneca-Cayuga's* alleged reliance on the principle that deference should be given "the Executive's [sic] carrying out a statutory scheme, here a BIA-judicial program funding agreement demanding uniform and fair use of Navajo law" pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). As *Seneca-Cayuga* noted, in *Chevron,* the Court held that an executive agency's interpretation of a statutory scheme it is entrusted to administer is entitled to deference. The agency findings or action on which petitioners rely is an alleged agreement between the tribe and the Bureau of Indian Affairs providing funding for the tribal courts. The funding agreement simply does not address tribal court subject matter jurisdiction over non-Indians. Thus, *Seneca-Cayuga* is inapplicable to petitioners' arguments.

Petitioners cite to *Kennedy v. Hughes*, 2003 LEXIS 5475, at *12 (10th Cir. 2003), claiming that it held Indian nation forums have exclusive jurisdiction for vindication of the alleged ICRA violations asserted here. As an initial matter, this action does not involve ICRA claims. ICRA protects only against wrongdoing by tribal governments, not the private, non-Indian parties against whom petitioners seek relief. Petitioners also misstate *Kennedy's* holding. In *Kennedy*, members of two different Indian tribes brought suit in federal court against various tribe officials claiming violations of ICRA. The district court dismissed plaintiffs' claims, holding no private right of action existed under ICRA except with respect to habeas corpus actions. The Tenth Circuit affirmed, finding that the only exception to the above rule is where the dispute involves a non-Indian party, a tribal forum is not available, and the dispute involves issues falling outside of internal tribal

affairs. *Id.* at **8-9. In such a case, *Kennedy* held that a party may bring suit against a tribe or its subsidiaries in *federal* court. Thus, *Kennedy* does not support petitioners' arguments here in favor of tribal court jurisdiction.

Petitioners also cite *Penn v. United States*, 324 F.3d 992 (8th Cir. 2003), *vacated by, reh'g. denied*, 2003 U.S. App. LEXIS 13587 (8th Cir. N.D., July 7, 2003), as upholding Indian Court authority over non-members. As noted above, the Eighth Circuit's opinion on which petitioners rely has been vacated. *Id.* In addition, petitioners misrepresent the holding of the vacated opinion. In *Penn*, the plaintiff, a non-Indian, sued federal BIA officials and federal and state law enforcement officials in federal court alleging they violated her constitutional rights by serving and executing a tribal court order excluding her from the Standing Rock Sioux Indian Reservation. Defendants moved to dismiss on the basis of qualified and absolute immunity, which motion the district court denied. In its original opinion, the Eighth Circuit reversed and remanded with directions to enter summary judgment for the defendants. However, the Eighth Circuit specifically noted that its holding was not based on a finding of tribal court subject matter jurisdiction, and it did not need to reach that issue to resolve the case. *Id.* at 997 ("We need not resolve whether Judge Dog Eagle actually had jurisdiction over this matter.")

Petitioners also rely on *International Bancorp, LLC v. Societe des Bains de Mer Cercle Etrangers a Monaco*, 329 F.3d 359 (4th Cir. 2003). Although *International Bancorp* cites the Commerce Clause, the case addressed the scope of the Lanham Act and the Anticybersquatting Act and has

nothing to do with the authority of the tribal courts over non-members.

CONCLUSION

For the reasons stated above, petitioners' supplemental authorities do not support the relief they seek. The petition for writs of mandamus and prohibition should be denied.

Respectfully submitted,

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